

February 11, 2011

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th St., SW  
Washington, DC 20554

Re: Notice of *Ex Parte* Communication, MB Docket No. 10-215

Dear Secretary Dortch:

On February 10, 2011, Barry Ohlson, Chief Policy Counsel, Cox Enterprises, Inc., (“Cox”) sent the attached e-mail to the following staff of the Federal Communications Commission Media Bureau and the Office of General Counsel: Susan Aaron, James Carr, Nancy Murphy, and Julie Veach. The e-mail transmitted a copy of the judicial order consolidating the negative option billing case filed against Cox with approximately 20 similar cases filed in various federal courts. The e-mail suggested that the timing of the judicial consolidation underscores the need for expeditious action by the Media Bureau to “clarify that it has primary jurisdiction to interpret federal cable law under the Communications Act, and that the negative option billing rule has been interpreted to require something akin to reasonable, actual consent by the consumer.”

Please feel free to contact me if you have questions concerning this matter.

Sincerely,

/s/ Robert G. Kidwell

Robert G. Kidwell

Attachment

cc: Nancy Murphy  
Julie Veach  
Susan Aaron  
James Carr

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**From:** Ohlson, Barry (CEI-Washington,DC) [<mailto:Barry.Ohlson@coxinc.com>]

**Sent:** Thursday, February 10, 2011 02:54 PM

**To:** [julie.veach@fcc.gov](mailto:julie.veach@fcc.gov) <[julie.veach@fcc.gov](mailto:julie.veach@fcc.gov)>; [nancy.murphy@fcc.gov](mailto:nancy.murphy@fcc.gov) <[nancy.murphy@fcc.gov](mailto:nancy.murphy@fcc.gov)>; [james.carr@fcc.gov](mailto:james.carr@fcc.gov) <[james.carr@fcc.gov](mailto:james.carr@fcc.gov)>; [susan.aaron@fcc.gov](mailto:susan.aaron@fcc.gov) <[susan.aaron@fcc.gov](mailto:susan.aaron@fcc.gov)>

**Cc:** Koh, Grace (CEI-Washington,DC) <[Grace.Koh@coxinc.com](mailto:Grace.Koh@coxinc.com)>; Kidwell, Robert

**Subject:** MB Docket No. 10-215

All: In follow up to our *ex parte* presentation on January 11, 2011, I wanted to pass along the attached order of the Judicial Panel on Multidistrict Litigation (the "MDL Panel") transferring the negative option billing case filed against Cox in California to the Western District of Oklahoma for consolidation with the approximately 20 set-top box tying cases already consolidated in that court. The release of this order by the MDL Panel comports with the timing that Cox has anticipated for this litigation, and Cox expects that it will be required to respond substantively to the underlying complaint within the next few weeks.

This timing again underscores the urgent need, discussed in Cox's comments and in Time Warner Cable's December 10, 2010 *ex parte*, for the Media Bureau to clarify that it has primary jurisdiction to interpret federal cable law under the Communications Act, and that the negative option billing rule has been interpreted to require something akin to reasonable, actual consent by the consumer.

Please feel free to contact us if you have any questions concerning this matter. Also, we will file a separate *ex parte* for this email.

- Barry Ohlson

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Barry Ohlson

Cox Enterprises, Inc.

[barry.ohlson@coxinc.com](mailto:barry.ohlson@coxinc.com)

202-637-1336

**UNITED STATES JUDICIAL PANEL**  
**on**  
**MULTIDISTRICT LITIGATION**

**IN RE: COX ENTERPRISES, INC., SET-TOP CABLE  
TELEVISION BOX ANTITRUST LITIGATION**

Brittini Cottle-Banks v. Cox Communications, Inc., et al.     )  
S.D. California, C.A. No. 3:10-2133                             )

MDL No. 2048

**TRANSFER ORDER**

**Before the Panel:**\* Plaintiff in this Southern District of California action move, pursuant to Rule 7.1, to vacate our order conditionally transferring the action to the Western District of Oklahoma for inclusion in MDL No. 2048. Defendants involved in MDL No. 2048<sup>1</sup> oppose the motion.

After reviewing the argument of counsel, we find that this action involves common questions of fact with the actions in this litigation previously transferred to the Western District of Oklahoma, and that transfer of this action to the Western District of Oklahoma for inclusion in MDL No. 2048 will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation.

Both plaintiff and defendants make compelling arguments in favor of their positions. In our original order directing centralization in this docket, we held that the Western District of Oklahoma was an appropriate Section 1407 forum for actions involving allegations that Cox improperly tied and bundled the lease of cable boxes to the ability to obtain premium cable services in violation of Section 1 of the Sherman Antitrust Act. *See In re Cox Enterprises, Inc., Set-Top Cable Television Box Antitrust Litig.*, 626 F.Supp.2d 1343 (J.P.M.L. 2009). The present action does not make similar antitrust allegations, and plaintiff argues that the conditional transfer order should be vacated on this basis. Plaintiff instead alleges that Cox fails to obtain affirmative requests by name for a cable box

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\* Judge Kathryn H. Vratil took no part in the decision of this matter.

<sup>1</sup> Cox Enterprises, Inc.; Cox Communications, Inc.; Cox Communications Louisiana, LLC; Cox Communications New Orleans, Inc.; CoxCom, Inc.; Cox Communications NCC, Inc.; Cox Communications Gulf Coast, L.L.C.; Cox Communications Louisiana, Inc.; Cox Communications Las Vegas, Inc. (d/b/a Cox Communications); Cox Nevada Telecom, LLC; CoxCom, Inc. (d/b/a Cox Communications Arizona); Cox Communications Holdings, Inc.; and Cox Communications EBD Holdings Inc. (collectively Cox). The present action names only Cox Communications, Inc. as a defendant.

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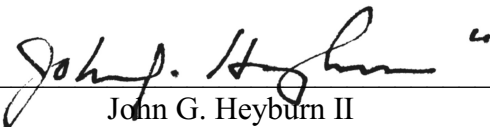
and/or remote control device prior to charging a rental fee for such equipment, and such practices violate the Cable Television Consumer Protection and Competition Act of 1992 and California consumer protection law.

While litigation of these different claims will likely involve some unique questions of fact and separate discovery issues, we are persuaded that this action shares sufficient questions of fact with MDL No. 2048 such that the parties, witnesses, and the judiciary would benefit from centralized pretrial proceedings. Transfer under Section 1407 does not require a complete identity or even a majority of common factual or legal issues as a prerequisite to transfer. *See, e.g., In re Gadolinium Contrast Dyes Prods. Liab. Litig.*, 536 F.Supp.2d 1380, 1382 (J.P.M.L. 2008). Cox argues that, at the heart of both the present action and MDL No. 2048 is an allegation that, in connection with the provision of cable services, Cox charges its customers a rental fee for a particular brand of set-top box without asking them or giving them the opportunity to use or buy their own set-top box. We find this argument persuasive. On the other hand, defendants have not provided specific examples of how discovery in this action will overlap with discovery in MDL No. 2048. Therefore, if the transferee judge determines that remand of this action is appropriate, procedures are available to accomplish this with a minimum of delay. *See* Rule 7.6, R.P.J.P.M.L., 199 F.R.D. at 436-38.

We are persuaded that the operative scheduling order in MDL No. 2048 allows the parties sufficient time to benefit from shared discovery. The transferee judge also can accommodate common and individual discovery tracks concurrently.

IT IS THEREFORE ORDERED that, pursuant to 28 U.S.C. § 1407, this action is transferred to the Western District of Oklahoma and, with the consent of that court, assigned to the Honorable Robin J. Cauthron for inclusion in the coordinated or consolidated pretrial proceedings occurring there in this docket.

PANEL ON MULTIDISTRICT LITIGATION

  
\_\_\_\_\_  
John G. Heyburn II  
Chairman

David R. Hansen  
Frank C. Damrell, Jr.  
Paul J. Barbadoro

W. Royal Furgeson, Jr.  
Barbara S. Jones